NO. 86 1620

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SMOKY GREENHAW COTTON COMPANY, INC., and JOHN C. GREENHAW,

Petitioners,

V.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., CHARLES DENNIS SCOTT and MARGARET SCOTT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a Plaintiff be forced to arbitrate his causes of action under the Racketeer Influenced and Corrupt Orgainizations Act?

2. Does Dean Witter v. Byrd, (overruling the intertwining doctrine), apply retroactively to civil RICO cases already tried to a jury?

3. Does an indictment of the Defendant in this case preclude arbitration of Plaintiff's RICO claims?

RULE 28.1 LIST

All parties in this proceeding have their names in the caption of this case.

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NO. _____

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., CHARLES DENNIS SCOTT and MARGARET SCOTT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Smoky Greenhaw Cotton Company and John C. Greenhaw, plaintiffs below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 15, 1986, which affirmed an order of the

District Court for the Western District of Texas that stayed plaintiffs' RICO claims pending arbitration. On January 20, 1987, the Petitioners motion for rehearing was denied. See Appendix D.

OPINIONS BELOW

This case has been before the Fifth Circuit on 3 different occasions. These opinions are reported at Smoky Greenhaw Cotton Company, Inc., v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 720 F.2d 1446 (5th Cir. 1983) (Greenhaw I) and Smoky Greenhaw Cotton Company, Inc., et. al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et. al., 785 F.2d 1274 (5th Cir. 1986)(Greenhaw II). The opinion of the District Court is reported at 650 F.Supp. at 220-222 (W.D. Tex. 1986) and reproduced at Appendix C hereto. The opinion in Smoky Greenhaw Cotton Company, Inc., et. al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et. al., 805 F.2d

1221 (5th Cir. 1986) (Greenhaw III) is reproduced at Appendix B hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. *1254(1) (1982).

STATUTORY PROVISIONS

This case deals with the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. * 1962, * 1964 (c) and * 1965 and the United States Arbitration Act 9 U.S.C. * 2 and * 3. The text of these provisions are reproduced in full at Appendix A hereto.

STATEMENT OF THE CASE

On the first appeal in this case the Fifth Circuit ruled that the "intertwining doctrine" precluded arbitration of any of Plaintiffs causes of action. Smoky Greenhaw Cotton Company, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 720 F.2d 1446 (5th Cir. 1983)(Greenhaw I).

On remand the case was presented to a

jury on all issues except the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C., 1961-68. The District Court granted Defendants motion for instructed verdict on RICO. The jury found that the defendants violated the Commodity Exchange Act, the Securities Exchange Act and breached a fiduciary duty to Plaintiffs. Damages were awarded to J.C. Greenhaw as follows: unauthorized commodity trades $36,925.00, security act violation $697.00, breach of duty $36,925.00, with punitive damages of $25,000.00. Damages awarded to Smoky Greenhaw Cotton Company were as follows: unauthorized commodity trades $149,602.00, securities act violation $4,223.00, breach of duty $149,602.00, with punitive damages of $100,000.00.

One week after the jury returned its verdict in this case, this Court in Dean Witter Reynolds, Inc. v. Byrd 470 U.S. 213

(1985) (referred to as Byrd or Dean Witter) ruled that the intertwining doctrine would not be followed and arbitrable claims would be severed from non-arbitrable claims.

The trial Court concluded that Byrd would apply retroactively and issued its' judgment on the securities claim but sent Plaintiff's other causes of action to arbitration.

On the second appeal the Fifth Circuit affirmed the trial Courts judgment under the Securities Exchange Act, vacated the order ordering arbitration of Plaintiffs other claims and entered judgment according to the jury verdicts (except for punitive damages). Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274 (5th Cir. 1986)(Greenhaw II).

Additionally, Plaintiffs RICO claims were remanded. The Fifth Circuit

concluded there was sufficient evidence to go to the jury. Initially, the Fifth Circuit ruled that Plaintiffs' RICO claims were not subject to arbitration. However, on May 13, 1986, pursuant to Defendants motion for rehearing, that panel vacated the portion of its opinion dealing with the arbitrability of RICO and left the issue to the District Court. (Greenhaw II)

On remand the trial Court, in its memorandum and order, dated June 18, 1986, concluded that Plaintiffs' RICO claims were subject to arbitration. Accordingly, Plaintiffs' RICO claims were stayed and the Plaintiffs' claims were ordered to arbitration. See Appendix C.

On the third appeal of this case, the Fifth Circuit ruled that RICO claims are arbitratable and the Dean Witter decision applied retroactively to Plaintiffs RICO claims. Smoky Greenhaw Cotton Company,

Inc., et al v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. (Greenhaw III) See Appendix B.

After the Fifth Circuit panel entered its judgment the Defendant, Charles Dennis Scott, was indicted by a Texas Grand Jury alleging felony theft arising out of unauthorized commodity trades in Plaintiffs accounts. See Appendix E. Plaintiffs seek certiorari so they may properly have their day in Court under the Racketeer Influenced and Corrupt Organizations Act.

REASONS FOR GRANTING THE WRIT

The Circuit Courts are split on whether RICO cases are subject to mandatory arbitration and the issue is presently before this Court in Shearson/American Express v. McMahon, No. 86-44, argued orally on March 3, 1987. Compare Mayaja, Inc. v. Bodkin, 803 F.2d 157 (5th Cir. 1986) and Greenhaw III with

McMahon. The Petitioners requested the Fifth Circuit to await this Court's decision in McMahon before entering judgment but this request was denied. Additionally, the case presents important questions concerning retroactive application of this Courts decision in Dean Witter v. Byrd, (overruling the intertwining doctrine). Finally, the case presents an issue of first impression: should a felony indictment preclude arbitration of the accompanying civil RICO case.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT OF THE CIRCUIT COURTS BECAUSE ALL RICO CLAIMS SHOULD BE LITIGATED AND NOT ARBITRATED.

This issue was argued orally on March 3, 1987 in the McMahon case and the Court has before it the briefs filed there. Petitioners would therefore, add only the following to support the position that

RICO should not be subject to arbitration.

Arbitration is an inferior forum to the Courtroom and not suitable to protect those whose money has been taken by criminal activity. In 1954 this Court in Wilko v. Swan, 346 U.S. 427 (1953), recognized the limitations of arbitration in civil securities cases. The Court in Wilko recognized that in arbitration you are limited in discovery and compulsory process and that testimony under oath is often severely limited. These limitations are exacerbated when applied to the RICO statute which specifically requires conduct, of an enterprise, through a pattern of racketeering activity.

Without liberal Federal Rules of Civil Procedure with compulsory process, it will be impossible in the great majority of cases, for the civil Plaintiff who has been victimized in a complicated pattern of racketeering, to prevail. Those

engaged in criminal activity invariably attempt to cover their tracks. Without discovery and compulsory process the RICO enterprise will frustrate those that Congress desired to protect. By granting treble damages to civil RICO victims, Congress sought to deter criminal activity in business. Congress specifically granted broad venue and process in section 1965 of the RICO Act and compulsory arbitration will entirely eleminate these provisions of the statute.

The agreement to arbitrate should be overriden by the public policy against allowing a criminal to benefit from his wrongdoing. Quite simply, arbitration, with limited jurisdiction and process, can not protect the victims of large scale, complicated frauds. If this Court orders arbitration of RICO, the gullible will be inundated with elusive, fast talking, white collar racketeers with a contract in

their pocket containing an agreement to arbitrate all disputes before their friends and acquaintances. The enterprising criminal mind, always searching for a new pigeon to pluck, will devise innumerable arbitration forums of dubious integrity at worst and prejudiced at best, to decide the disputes with their victims.

In this dispute the Petitioners have a right to seek arbitration before the New York Cotton Exchange or the New York Stock Exchange. Because the Cotton Exchange will not accept a claim after one year of its occurance, the choice is the New York Stock Exchange. The Petitioners contend that even arbitration before the exchange is unfair because the panel contains insiders in the securities industry and they should not be deciding whether their associates have engaged in patterns of racketeering activity. These

arbitrators do not make conclusions of law or findings of fact and accordingly, the judicial review is almost nonexistent. Compare the rules of the Japan Commercial Arbitration Association relied upon by this Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., _U.S._, 105 S.Ct. 3346 at footnote 20 (1985) requiring the arbitrators to give a statement of reasons for the award. At least Judge Wopner, of the People's Court on television, gives reasons for his decision. Do not cases decided under RICO deserve the same scrutiny?

It is not surprising that the securities industry member always seeks arbitration knowing that under the next arbitration he will be deciding the fate of the firm whose arbitrator is presently hearing his case. In other words, this week I arbitrate your disputes and next week you arbitrate my disputes.

The victim starts off with a disadvantage in these arbitration forums. As the Professor Alan R. Bromberg, author of Securities and Commodities Law Fraud, noted in the critique of a research paper written by the undersigned in 1983 that: "many people think securities arbitrators are pro-industry." Also see the New York Times, Business Section at 8F, March 29, 1987, where one lawyer stated he "would rather defend a capitalist before the comrades' court than a client before an arbitration panel of the New York Stock Exchange," after one recent arbitration. Also in the article, notice that in one rare study of arbitration, of the 57% who were awarded damages, 78% of those were awarded 60% or less of their claims. Also see the following poignant observation concerning arbitration in the case of Stroh Container Co. v. Delphi Industries Inc., 783 F2d 743 (8th Cir.

1986) at footnote 12.

> Although arbitration often is said to provide simple, inexpensive and expeditious dispute resolution, recent cases before this Court, and comments by counsel, as in this case, cast considerable doubt upon such adjective praise. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984) (District Court may not grant injunctive relief pending arbitration). Parties resorting to arbitration in commercial situations are finding not only that the arbitration process is complex, expensive and time consuming, but the results of arbitration by private and untrained "judges" are distantly remote from the fair process procedurally followed and application of principled law found in the judicial process. . . Such comments need to be made however, for parties to the arbitration process to realize that it is not the most perfect alternative to adjudication. The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law. . . . Professor Owen Fiss provides the realism overlooked by many when he writes:
>
> Adjudication is more likely to

> do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.

It would be possible to adopt an alternative in this case. In the alternative to ruling that pre-dispute arbitration agreements under RICO are always prohibited against public policy in a domestic situation, the Court should consider application of Court-Annexed Arbitration. Presently 10 Courts are now participating in the Court-ordered arbitration pilot program in the Federal Courts, one of which is the Western District of Texas. (See Local Rule 300-9 for the rules concerning arbitration) Annual Reports Of The Director Of The Administrative Office Of The United States Courts, 1985.

Court administered arbitration is preferable to arbitration by arbitrators chosen by the racketeer in advance of his criminal activity. Although Court-annexed arbitration in some cases may result in inefficiency due to the right to trial de novo, it appears it leads to more rapid disposition of cases. See Evaluation of Court-Annexed Arbitration in the Three Federal Distirct Courts, by E. Allan Lind and John E. Shapard, Federal Judicial Center, March 1981. If arbitration is ordered in RICO cases it should be conducted in Court-Annexed programs so the statute can be interpeted with its broad remedial purpose in mind.

The Fifth Circuits' approach ordering Plaintiffs' RICO claim to arbitration before the New York Stock Exchange should be reversed.

II. PLAINTIFFS RICO CLAIMS SHOULD NOT BE SUBJECT TO ARBITRATION BECAUSE IT HAS ALREADY BEEN TRIED TO A JURY.

Even if some RICO cases are subject to arbitration, this case should not be arbitrated because this case has been tried to a jury. In effect the question here is whether the Dean Witter v. Byrd case and the McMahon case apply retroactively. The Fifth Circuit misconstrued the application of this Court's decision in Chevron Oil v. Huson, 404 U.S. 97, 92S.Ct. 349 (1971) to the facts of this case. This Court instructed in Chevron Oil that many times new law will not be applied retroactively. The factors to be considered are basically reliance on an issue of first impression, policy considerations and equitable considerations.

Arbitration of RICO is a new issue. Petitioners have litigated this action for

the past four (4) years and six (6) months as actively as is possible. Because of this active litigation, it would be unfair to order arbitration. As was stated in Chevron Oil, "To abruptly terminate this lawsuit that has proceeded through lengthly and, no doubt, costly discovery stages for a year, would surely be inimical to the beneficent purpose of the Congress." Chevron Oil v. Huson, 404 U.S. at 108.

Because the Petitioners have been actively litigating this case and have already gone to trial, it would be iniquitous to now force them to arbitration.

The policy considerations favoring arbitration are here not present. Petitioners have tried their case to a jury. But for the error of the trial Court, this case would be over. It is inequitable to the Plaintiffs to now deny

them their jury trial because of a change in law.

For this additional reason, the Petitioners request this Court to grant certiorari in this case.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FELONY INDICTMENT OF THE DEFENDANT SHOULD PRECLUDE ARBITRATION.

On February 16, 1987, Charles Dennis Scott was indicted by a state grand jury for felony theft. See Appendix E. The indictment alleges the same scheme that forms the basis of Plaintiffs RICO action already tried to a Federal civil jury. If the Court in McMahon rules that civil RICO cases are arbitrable, it should make an exception where the Defendant has been indicted.

In the McMahon case the Petitioners, Shearson, in its' Petition for a Writ of Certiorari, at footnote 24, requests

rejection of the Second Circuit's per se rule, and suggests allowing arbitration of RICO claims that "touches upon no great societal or public interest." Here the public interest is to prevent theft and fraud by preventing infiltration of crooks into legitimate business. This case is the classic example of what RICO was designed to prevent. Merrill Lynch was infiltrated by a crook, but now they want their associates in the industry to pass judgment on this case. This case has been tried to a jury. The jury found fraud. The Court of Appeals concluded the evidence sufficient to go to a jury. A Grand Jury has indicted the Defendant for this very fraud. In such an instance it would be unfair to require arbitration before the Defendants peers. Shearson, in its' Petition for Certiorari, further suggested at footnote 24, that the

arbitration department can decline the use of their facilities where the dispute "is not a proper subject matter for arbitration." Uniform Code of Arbitration, *1(b), N.A.S.D. Manual (CCH) *3712(b). Petitioners here would suggest that this Court decide for the arbitrators, rather than the arbitrators deciding for the Courts, that where the Defendant stands indicted, the case is not a proper subject matter for arbitration.

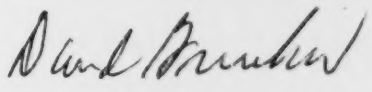
CONCLUSION

For the forgoing reasons Petitioners respectfully request that this Court issue a Writ of Certiorari in this case to review the decision of the United States Court of Appeals for the Fifth Circuit.

DATED: ODESSA, TEXAS

April 8, 1987

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served as follows. Three copies of the above and foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit was mailed by depositing in a United States Post Office, first class mail, postage prepaid, return receipt requested addressed to the attorney for the Respondents, Mr. Kenneth E. Johns, Jr., 3200 First City Bank, 1001 Fannin, Houston, TX 77002-6760, on this the 8th day of August, 1987.

David Burke

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. *2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversey therafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversey arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save opon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. * 3

If any suit or proceeding be brought in any of the courts or the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. * 1962

(a) It shall be unlawful for any person who has received any income

derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as principal within the meaning of seciton 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the

members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or forein commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the

activites of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affair through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. * 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. * 1965

(a) Any civil aciton or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in

the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

APPENDIX B

No. 86-1440
Summary Calender
Dec. 15, 1986.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

SMOKY GREENHAW COTTON CO., INC.,
Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., et. al.,
Defendant-Appellees.

Appeal from the United States District Court for the Wester District of Texas.

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:

This case has now made its way to our Court for the third time. See Smoky Greenhaw Cotton Co. v. Merrill Lynch, 720 F.2d 1446, (5th Cir. 1983)(Greenhaw I); Smoky Greenhaw Cotton, Co. v. Merrill Lynch, 785 F.2d 1274 (5th Cir. 1986)(Greenhaw II). In Greenhaw II, the panel reversed the District Court's directed verdict in favor of Merrill Lynch

on Greenhaw's claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. ** 1961 et seq.

In remanding the case for a new trial of Greenhaw's RICO claim, the panel refused to decide the arbitrability of that claim, opting instead to leave the issue for the District Court. On remand, the District Court concluded that Greenhaw's RICO claim was arbitrable and entered an order compelling arbitration of the claim. Greenhaw appeals contending that civil RICO claims are not arbitable.

[1] Two panels of the Court have recently held that under facts similar to the facts in the instant case, civil RICO claims are arbitrable. See Beck v. Merrill Lynch, _F.2d__, No. 86-2051 (5th Cir. Nov. 5, 1986); Mayaja v. Bodkin, 803 F.2d 157, 162-66 (5th Cir. 1986). On the basis of Beck and Mayaja, we affirm the order of the District Court compelling

arbitration of Greenhaw's RICO claim.

[2] One additional matter raised by this appeal requires comment. In Greenhaw II, the panel refused to apply the Supreme Court's decision in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed2d 158 (1985), retroactively to compel arbitration of Greenhaw's commodities claims and breach of fiduciary duty claims. Critical to the panel's determination was the fact that those claims had already been litigated and decided in a four-day jury trial. Summarizing its conclusion, the panel noted that;

> the parties, with the benefit of relatively unlimited discovery and the Federal Rules of Evidence, had a fair fight in a fair forum. It would be senseless to now require them to arbitrate issues that they have already gone to great time and expense to litigate.

785 F.2d at 1279.

The panel left open the question of whether Dean Witter's rejection of this

Circuit's intertwining doctrine would apply retroactively to Greenhaw's RICO claim. 785 F.2d at 1281. Greenhaw contends in the instant appeal that it does not and thus that the intertwining doctrine requires a jury trial of that claim in District Court.

We disagree. The equitable consideration that persuaded the panel in Greenahw II not to apply Dean Witter to those claims already fully litigated are not present here. Greenhaw's RICO claim has not been fully litigated. The parites have not already "had a fair fight in a fair forum," 785 F.2d at 1279, brought to a fair conclusion on the RICO claim. Refusing to apply Dean Witter to Greenhaw's RICO claim (unlike the commodities claims) will require a complete full-blown trial.

Furthermore, the policies underlying the intertwining doctrine, i.e., avoidance

of piecemeal litigation and protection of the federal court's jurisdiction over federal securities law claims, are inaplicable here. Greenhaw's federal securities law claim was completely and finally resolved in Greenhaw II.

Given the absence of any equitable or policy consideration mitigating against retroactive application of Dean Witter to Greenhaw's RICO claim, we conclude that the District Court properly required Greenhaw to arbitrate that claim.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1440
Summary Calender

D.C. Docket No. CA-82-131-MO

SMOKY GREENHAW COTTON CO., INC.,
Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., ET. AL,
Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas

Before REAVELY, JOHNSON, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on the be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that Plaintiff-Appellant pay to Defendants-Appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 15, 1986

ISSUED AS MANDATE:

APPENDIX C

SMOKY GREENHAW COTTON CO., INC., and JOHN C. GREENHAW,

Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Charles D. Scott and Margaret Scott,

Defendants.

Civ. A. No. MO-82-CA-131.

United States District Court,
W.D. Texas,
Midland-Odessa Division

June 18, 1986

MEMORANDUM OPINION AND ORDER

BUNTON, District Judge.

On remand, 785 F.2d 1274 (5th Cir. 1986), the specific question before this court is the applicability vel non of the analysis of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), to the plaintiffs' RICO claim. Although Mitsubishi Motors arose in an international context, this court finds that its analysis is applicable to

domestic, e.g., RICO claims.

In Ross v. Mathis, 624 F.Supp. 110 (N.D.Ga. 1985), the district court, holding that RICO claims are subject to arbitration under the Federal Arbitration Act, stated:

> Unlike [the Securities Act of 1933 and the Securities Exchange Act of 1934], RICO does not include a non-waiver provision. Nothing in RICO shows Congress' intent to 'preclude a waiver of judicial remedies.' Mitsubishi, 105 S.Ct. at 3355. Thus, RICO claims may be arbitrated....
>
> [T]he Court in Mitsubishi has indicated the paramount importance of the Arbitration Act by requiring any other statute claiming to override it to clearly indicate that intent. Mitsubishi, 105 S.Ct. at 3353-55. These factors demonstrate that absent contrary Congressional intent,

statutory claims are arbitratable. 624 F.Supp. at 116-17.

Likewise, in Brener v. Becker Paribas, Inc., 628 F.Supp. 442 (S.D.N.Y. 1985), the district court, holing that the plaintiff's RICO claims were arbitrable, stated:

> [T]here is a strong policy in favor of arbitration, and courts are reluctant to disregard the parties' express agreement to arbitrate. In light of this, and absent any indication that Congress intended to prohibit the arbitration of RICO claims, the Court concludes that RICO claims are arbitrable.
>
> Arbitration agreements should be enforced unless Congress indicates that a waiver of judicail remedies is prohibited. See Mitsubishi, 105 S.Ct. at 3355. RICO does not include an antiwaiver provision, and there is no

indication that Congress intended to exempt civil RICO claims from the dicates of the Arbitration Act.

The partieshere agreed to arbitrate any claims arising from their transactions, and the plaintiff's RICO claims arose from those transactions. If arbitration of such claims is to be prohibited, it must be done by Congress, not the Court.

628 F.Supp. at 449-51 (citations omitted).

The court is mindful that the district court's opinion in Brener v. Becker Paribas, Inc., supra, is not controlling authority within the Second Circuit by reason of the Court of Appeals' ruling in McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2nd Cir. 1986), that RICO claims are non-arbitrable. The Fifth Circuit has not addressed this issue but rather has left the task for this court.

In McMahon v. Shearson/American Express, Inc., supra, the Second Circuit (in holding RICO claims to be non-arbitrable) relied upon its prior reasoning in American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968), that strong public policy in enforcement of the antitrust laws precluded arbitration. The McMahon court concluded that similar policies were present with respect to RICO claims, and that RICO claims should be held to be non-arbitrable. 788 F.2d at 98. In reaching this conclusion, the court attempted to distinguish Mitsubishi Motors, stating that that case has significance only in international disputes and does not impact on the American Safety doctrine as applied to domestic disputes. Id

The court agrees with the defendants that the Second Circuit's conclusion that the viability of the American Safety

doctrine remains intact after Mitsubishi Motors is unsupported by the Supreme Court's opinion.

The Supreme Court in Mitsubishi Motors concluded that concerns for international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes required arbitration of the claims at issue. 105 S.Ct. at 3355. However, the Court determined the proper analysis for determining whether any federal statutory claim is exempt from mandatory arbitration under the Federal Arbitration Act and expressed "skepticism of certain aspects of the American Safety doctrine." 105 S.Ct. at 3355, 3357-60.

I conclude that the analytical framework set out in Mitsubishi Motors should not be strictly limited to

situations involving international disputes and is equally applicable to domestic statutory claims. Absent an express congressional intent in either the text or legislative history, a federal statutory cause of action will not be exempt from mandatory arbitration under the Federal Arbitration Act.

Plaintiffs rely on policy considerations of speed, cost and efficiency in contending that arbitration should not be compelled in this case. This court has a keen sense of appreciation for such considerations and the resolution of this cause is not inconsistent therewith.

Accordingly, it is hereby ORDERED and ADJUDGED as follows:

1. The motion for stay pending arbitration and to compel arbitration is GRANTED.

2. This Order granting defendants' motion for stay and to compel arbitration shall be STAYED upon the timely filing of a notice to appeal.

3. Should notice of appeal not be timely filed, the parties shall, within sixty (60) days of the filing of this Order, submit a written report setting forth the status of the arbitration proceeding.

4. The Clerk of the Court is directed to indicate that this case is closed for administrative purposes.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1440

SMOKY GREENHAW COTTON CO., INC.,
Plaintiff-Appellant,

versus

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that appellant's petition for rehearing is DENIED.

IT IS FURTHER ORDERED that appellant's motion to vacate the Court's opinion rendered on December 15, 1986, is DENIED.

FILED - January 20, 1987.

APPENDIX E

NO. 960

THE STATE OF TEXAS * IN THE DISTRICT COURT
*
VS. * OF
*
CHARLES DENNIS SCOTT * MARTIN COUNTY, TEXAS

INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

The grand jury of Martin County, State of Texas, duly organized at the January term, A.D. 1987, of the District Court of said county, in said court at said term, do present that in Martin County, Texas, CHARLES DENNIS SCOTT, hereinafter styled the Defendant, heretofore previously, beginning on or about February 9, 1982 thru March 2, 1982 with the intent to deprive the owner, Smoky Greenhaw Cott n Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property,

such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith, Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 6 May 1982 Cotton Contracts at 65.63 and bought 1 May 1982 Cotton Contract at 65.66 on February 9, 1982 and sold 7 May 1982 Cotton Contracts at 65.59 on March 2, 1982, such property having a value of $743.00.

COUNT TWO

And the Grand jurors aforesaid, do further present in and to said Court that on or about February 22, 1982 thru March 2, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the

Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 10 May 1982 Cotton Contracts at 66.20 and bought 2 December 1982 Cotton Contracts at 72.11 on February 22, 1982 and on March 2, 1982 sold 2 May 1982 Cotton Contracts at 65.58, sold 2 May 1982 Cotton Contracts at 65.60, sold 2 May 1982 Cotton Contracts at 65.69, sold 2 May 1982

Cotton Contracts at 65.70, sold 2 May 1982 Cotton Contracts at 65.79 and sold 2 December 1982 Cotton Contracts at 71.80, such property having a value of $3,958.00.

COUNT THREE

And the Grand jurors aforesaid, do further present in and to said Court that on or about February 22, 1982 thru March 4, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the

owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 8 December 1982 Cotton Contracts at 72.11 on February 22, 1982 and on March 3, 1982 sold 1 December 1982 Cotton Contracts at 71.40, sold 5 December 1982 Cotton Contracts at 71.65 and on March 4, 1982 sold 2 December 1982 Cotton Contracts at 71.30, such property having a value of $2,987.00.

COUNT FOUR

And the Grand jurors aforesaid, do further present in and to said Court that on or about February 22, 1982 thru March 4, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property,

such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 7 December 1982 Cotton Contracts at 72.19 on February 22, 1982 and on March 4, 1982 sold 5 December 1982 Cotton Contracts at 71.30 and sold 2 December 1982 Cotton Contracts at 71.34, such property having a value of $3,663.00.

COUNT FIVE

And the Grand jurors aforesaid, do further present in and to said Court that on or about February 22, 1982 thru March 18, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the

Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 2 December 1982 Cotton Contracts at 72.19 on February 22, 1982 and on March 18, 1982 sold 2 December 1982 Cotton Contracts at 71.19, such property having a value of $1,168.00.

COUNT SIX

And the Grand jurors aforesaid, do further present in and to said Court that on or about February 22, 1982 thru March 19, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 1 December 1982 Cotton Contract

at 72.19 on February 22, 1982 and on March 19, 1982 sold 1 December 1982 Cotton Contract at 70.95, such property having a value of $711.00.

COUNT SEVEN

And the Grand jurors aforesaid, do further present in and to said Court that on or about March 15, 1982 thru March 16, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the

owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

On March 15, 1982 sold 2 July 1982 Cotton Contracts at 66.84, sold 2 July 1982 Cotton Contracts at 66.90, sold 2 July 1982 Cotton Contracts at 66.94, sold 2 July 1982 Cotton Contracts at 67.14, sold 2 July 1982 Cotton Contracts at 67.24, sold 1 July 1982 Cotton Contract at 67.34, sold 2 July 1982 Cotton Contracts at 66.95, sold 2 July 1982 Cotton Contracts at 66.97 and sold 2 July 1982 Cotton Contracts at 67.04 and on March 16, 1982 bought 2 July 1982 Cotton Contracts at 67.16, bought 2 July 1982 Cotton Contracts at 67.21, bought 4 July 1982 Cotton Contracts at 67.22, bought 3 July 1982 Cotton Contracts at 67.26, bought 2 July 1982 Cotton Contracts at 67.36, bought 2 July 1982 Cotton Contracts at 67.23 and bought 2 July 1982 Cotton

Contracts at 67.30, such property having a value of $3,328.00.

COUNT EIGHT

And the Grand jurors aforesaid, do further present in and to said Court that on or about March 15, 1982 thru March 19, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith,

Inc., as follows; Bought 1 July 1982 Cotton Contract at 67.30 on March 19, 1982 and on March 15, 1982 sold 1 July 1982 Cotton Contract at 67.34, such property having a value of $71.00.

COUNT NINE

And the Grand jurors aforesaid, do further present in and to said Court that on or about March 22, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity

transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 10 July 1982 Cotton Contracts at 67.90 on March 22, 1982 and on March 22, 1982 sold 10 July 1982 Cotton Contracts at 67.74, such property having a value of $1,400.00.

COUNT TEN

And the Grand jurors aforesaid, do further present in and to said Court that on or about April 23, 1982 thru May 12, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to

Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Sold 2 July 1982 Cotton Contracts at 68.20, sold 2 July 1982 Cotton Contracts at 68.30, sold 2 July 1982 Cotton Contracts at 68.40, sold 2 July 1982 Cotton Contracts at 68.50, sold 2 July 1982 Cotton Contracts at 68.62 and on May 12, 1982 bought 10 July 1982 Cotton Contracts at 68.50, such property having a value of $1,320.00.

COUNT ELEVEN

And the Grand jurors aforesaid, do further present in and to said Court that on or about April 27, 1982 thru May 28, 1982 in Martin County, Texas, Charles

Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 3 October 1982 Cotton Contracts at 72.50 on April 27, 1982 or May 4, 1982 and on May 28, 1982 sold 3 October 1982 Cotton Contracts at 68.70, such property having the value of $5,952.00.

COUNT TWELVE

And the Grand jurors aforesaid, do further present in and to said Court that on or about May 24, 1982 thru May 28, 1982 in Martin County, Texas, Charles Dennis Scott, hereinafter styled the Defendant, with the intent to deprive the owner, Smoky Greenhaw Cotton Company, of property, namely money, did then and there without the effective consent of the owner, unlawfully appropriate property, such appropriation consisting of a transfer of title to the property to Charles Dennis Scott, Margaret Scott, Merrill Lynch, Pierce, Fenner and Smith Inc., and others, such appropriation being carried out by Defendant making unauthorized commodity transactions in the owners Commodity Trading account with Merrill Lynch, Pierce, Fenner and Smith, Inc., as follows;

Bought 2 October 1982 Cotton Contracts at 69.74 on May 24, 1982 and on May 28, 1982 sold 2 October 1982 Cotton Contracts at 68.70, such property having a value of $1,208.00.

COUNT THIRTEEN

And the Grand Jurors aforesaid, do further present in and to said Court: that all of said amounts as alleged in each count were obtained pursuant to one scheme and continuing course of conduct and that the aggregate amount totals more than $20,000.00.

AGAINST THE PEACE AND DIGINITY OF THE STATE.

/s/ Jerry Webb
FOREMAN OF THE GRAND JURY

Robert S. Morris
Assistanct District Attorney, Martin County

FILED
February 16, 1987
/s/ Virginia James
Clerk, District County,
Martin Co., Texas

STATE OF TEXAS)
)
County of MARTIN)

I, VIRGINIA JAMES, Clerk of the District Court, in and for Martin County, Texas do hereby certify that the foregoing is a true and correct copy of Indictment, Cause No. 960 - The State of Texas vs. Charles Dennis Scott as the same appears now on file in my office.

Given under my hand and seal of office in Stanton, Texas, this the 17 day of February , A.D. 19 87 .

Clerk District Court, Martin County, Texas

By /s/ Bobby Yater Deputy

CASE NO. 86-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SMOKY GREENHAW COTTON COMPANY, INC., and JOHN C. GREENHAW,
Petitioners

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., CHARLES DENNIS SCOTT, and MARGARET SCOTT,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Defendants-Appellees, Merrill Lynch, Pierce, Fenner & Smith, Inc., Charles Dennis Scott, and Margaret Scott

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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CASE NO. 86-1620

IN THE

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OCTOBER TERM, 1986

SMOKY GREENHAW COTTON COMPANY, INC.,
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Petitioners

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., CHARLES DENNIS SCOTT,
and MARGARET SCOTT,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Merrill Lynch, Pierce, Fenner & Smith, Inc., Charles Dennis Scott, and Margaret Scott, Respondents, respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit previously filed herein by Smoky Greenhaw Cotton Company, Inc. and John C. Greenhaw.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION WHETHER RICO CLAIMS ARE ARBITRABLE IS ALREADY BEFORE THIS COURT IN *SHEARSON/AMERICAN EXPRESS, INC. v. McMAHON*

With respect to the first question presented by the Petition for Certiorari, i.e., whether a plaintiff may be forced to arbitrate causes of action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (1982) ("RICO"), this Court has pending before it the case of *Shearson/American Express, Inc. v. McMahon,* No. 86-44, which was orally argued on March 3, 1987. *McMahon* presents the same issue presented by Petitioners. Because the issue presented will be resolved in *McMahon,* Respondents respectfully submit that it is unnecessary for this Court to grant certiorari in this case on that issue.

Because Petitioners have not addressed the merits of the legal issue involved and have limited their comments to policy issues, Respondents will likewise not address the legal arguments supporting arbitrability of RICO claims. Nevertheless, Respondents feel obliged to respond to the attack on the arbitration system made by Petitioners.

Petitioners' primary argument is that under the rules of the New York Stock Exchange, Petitioners' claims would be resolved by "insiders in the securities industry" who would be "prejudiced at best." Although it is true that New York Stock Exchange arbitration panels typically include individuals employed in the securities industry,

it is required by the arbitration rules of the New York Stock Exchange that three of the five arbitrators be individuals from outside of the industry. Furthermore, the presence of persons with security industry experience on the arbitration panels is desirable inasmuch as such individuals are knowledgeable about the trading conduct complained of by Petitioners. Petitioners' contention that such individuals are inherently biased and that Petitioners will be unable to obtain a fair hearing in arbitration is argument, not fact.

Petitioners suggest that arbitration is not a desirable forum for assertion of their claims. Petitioners desire to have the extensive mechanisms for discovery under the Federal Rules of Civil Procedure for use in the prosecution of their RICO claims. However, it is the simplicity of arbitration which was bargained for by the parties. As often recognized by this Court, there is a strong federal policy in favor of enforcing agreements to arbitrate claims, thereby avoiding the expense and delays which are inherent in our court system. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

II.

THE NON-RETROACTIVITY DOCTRINE ENUNCIATED IN *CHEVRON OIL CO. v. HUSON* IS INAPPLICABLE TO PETITIONERS' RICO CLAIMS

Petitioners suggest that even if RICO claims are arbitrable, this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) requires a holding that Petitioners' RICO claims nevertheless are non-arbitrable. Petitioners argue in effect that this Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), should

not be applied to Petitioners' RICO claims retroactively, and that those claims are accordingly non-arbitrable under the old "intertwining doctrine."

Petitioners' contentions should be rejected for two reasons. First, even if *Byrd* is not to be retroactively applied, the "intertwining doctrine" as previously applied by the Fifth Circuit would not require a jury trial of Petitioners' RICO claims. All claims asserted by Petitioners, with the exception of the RICO claims, were resolved in *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274 (5th Cir. 1986) ("Greenhaw II"), including all claims under Rule 10b-5. The RICO claims were remanded to the district court. Because Petitioners' RICO claims are not joined with any non-arbitrable federal securities law claims, the intertwining doctrine would not prevent arbitration of Petitioners' RICO claims.

Second, the Fifth Circuit correctly held that *Huson* does not require non-retroactive application of *Byrd* to Petitioners' RICO claims. Although this Court in *Huson* identified three factors to be considered in dealing with the non-retroactivity question, the controlling factor for resolution of the question in this case is the third factor identified in *Huson*. This Court in *Huson* described that third factor by quoting a statement from *Cipriano v. City of Houma*, 395 U.S. 701 (1969), wherein it was stated, "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." 404 U.S. at 107.

Petitioners suggest that substantial inequitable results and injustice and hardship would result to Petitioners if forced to arbitrate their RICO claims because those claims have "already been tried to a jury." However, those claims have never been resolved. The trial court, at the first trial of this case (which was held prior to this Court's decision in *Byrd*), directed a verdict in favor of Respondents on Petitioners' RICO claims. The Court of Appeals determined that there was sufficient evidence to go to the jury on the RICO claims, and remanded those claims to the district court. The RICO claims have never been tried to a verdict, and resolution of those claims outside of arbitration would require a new trial in district court. Accordingly, the only "hardship" suffered by Petitioners is that Petitioners will be forced to arbitrate rather than litigate their RICO claims. However, that is precisely what Petitioners bargained for in agreeing to arbitration of their disputes with Respondents. In short, no substantial inequitable results and no injustice or hardship would occur if Petitioners are compelled to arbitrate their RICO claims. Therefore, the Court of Appeals' decision is not in conflict with *Huson*.

III.

A FELONY INDICTMENT OF A RICO DEFENDANT DOES NOT AFFECT THE ARBITRABILITY OF A CIVIL RICO CLAIM

Petitioners apparently argue that if this Court determines that RICO claims are arbitrable in *McMahon*, that that decision should not apply where a RICO defendant has been indicted on one of the predicate offenses alleged in the RICO claim.

Petitioners cite no authority for such a distinction, but merely argue that the existence of an indictment somehow changes the policy concerns involved. Respondents respectfully submit that the policy concerns are the same, regardless of whether a grand jury has indicted the RICO defendant. The civil RICO provisions are designed to deter criminal conduct, and are completely independent of the criminal processes which might be available to a prosecutor. The existence of both a civil RICO action and an indictment of the RICO defendant means only that the defendant is being pursued in both the civil and criminal forums. The existence of the indictment in no way impacts on the purposes behind or the prosecution of the civil RICO case. As noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ____U.S.____, 105 S. Ct. 3346, 3358-60 (1985), in the context of a civil antitrust claim, the remedial and deterrent purposes of the civil remedies in the federal statute are adequately preserved by pursuit of such claims in arbitration. This rationale applies to civil RICO claims regardless of whether the RICO defendant has been indicted for a predicate offense. There simply is no rational basis for a distinction between RICO cases where a RICO defendant has been indicted and those where a RICO defendant has not been indicted in resolving the arbitrability issue.

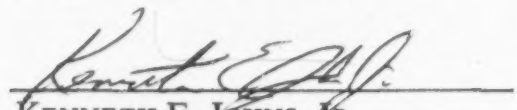
CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of

Certiorari filed by Smoky Greenhaw Cotton Company, Inc. and John C. Greenhaw.

Dated: May 7, 1987.

Respectfully submitted,



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Attorneys for Defendants-Appellees, Merrill Lynch, Pierce, Fenner & Smith, Inc., Charles Dennis Scott, and Margaret Scott

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served as follows. Three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed by depositing in a United States Post Office, first class mail, postage prepaid, return receipt requested, addressed to the attorney for Petitioners, Mr. David Greenhaw, P. O. Box 831, Odessa, Texas 79760, on this the 7th day of May, 1987.

KENNETH E. JOHNS, JR.